STATE OF MICHIGAN

COURT OF APPEALS

BOB TURNER, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

MARGARET LEAHY and FARZIN GHODSI,

Defendants/Counter-Plaintiffs-Appellees,

and

FRANKLIN BANK and STANDARD FEDERAL BANK,

Defendants.

UNPUBLISHED
September 19, 2000

No. 213700
Oakland Circuit Court
LC No. 96-532291-CZ

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment awarding defendants[1] damages on their counterclaim for breach of contract. We affirm.

In November 1994, defendants Margaret Leahy and Farzin Ghodsi contracted with plaintiff Bob Turner, Inc., for plumbing and septic system installation at the home defendants were building. Plaintiff completed the rough plumbing and installed part of the septic system by March 1995, however, the relationship between the parties broke down and plaintiff never completed the contracted work. In August 1995, plaintiff requested additional money, above the contract price, to finish the contract, but defendants refused to pay the additional amount. In September 1995, defendants hired two new

[1] For purposes of this appeal, the term defendants will refer to Margaret Leahy and Farzin Ghodsi only. Plaintiff's claims against defendants Franklin Bank and Standard Federal Bank were dismissed with prejudice on June 16, 1998.

contractors to complete the finish plumbing and the septic field. Plaintiff filed a lien against defendants' property and then filed suit to recover the balance of the contract, and defendants counterclaimed for breach of contract. After a bench trial, the court found that plaintiff breached the plumbing and septic system contracts. The court entered judgment for defendants, awarding $6,557 in damages. Defendants sought mediation sanctions and were awarded $5,000 in attorney fees and costs.

I

Plaintiff argues that the trial court erred when it found that plaintiff breached its contracts with defendants. In an action tried without a jury, we review the trial court's findings of fact for clear error. *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* We review the court's conclusions of law de novo. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999).

A

Plaintiff claims that it was prevented from completing its performance under the contract by defendants' failure to obtain the necessary plumbing fixtures and to notify plaintiff of the availability of the fixtures for installation. "[A] party to a contract cannot prevent, or render impossible, performance by the other party and still recover damages for nonperformance.'" *Kiff Contractors, Inc v Beeman*, 10 Mich App 207, 210; 159 NW2d 144 (1968), citing 17A CJS, Contracts, § 468, 638-642; 5 Williston, Contracts (3d ed), § 677, 224.

However, in this case, the court found that there was credible evidence that some of the fixtures were available for installation in July or August 1995, and that lack of communication between the parties did not prevent plaintiff from installing those fixtures. This finding was supported by the testimony of defendants that they had obtained some fixtures as early as March 1995, and that additional fixtures were purchased and made available in June and August 1995. Defendants also testified that plaintiff refused to install these fixtures because they were purchased at Home Depot. Given this evidence, we conclude that the trial court's finding that plaintiff was not prevented from installing plumbing fixtures was not clearly erroneous.

B

Plaintiff also argues that it was prevented from completing the installation of the septic system due to defendants' failure to remove the necessary trees. Plaintiff claims that it was defendants who breached this contract by hiring another party to complete the work before plaintiff was able to fully perform its obligations under the contract.

The trial court found that plaintiff's demand for additional money to complete the septic system contract constituted an anticipatory breach. Anticipatory breach of a contract occurs if, before the time of performance, a party to a contract unequivocally declares an intent not to perform. *Stoddard v Manufacturers National Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). "In determining whether an anticipatory breach has occurred, it is the party's intention manifested by

acts and words that is controlling, and not any secret intention that may be held." *Paul v Bogle*, 193 Mich App 479, 493; 484 NW2d 728 (1992). "'[A] party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." *Id.* at 494, quoting 2 Restatement Contracts 2d, § 250, 273-274.

Here, it is undisputed that plaintiff sent a letter to defendants in August 1995, in which plaintiff requested additional funds to complete the septic system installation. Plaintiff argued that the letter was not a breach, essentially because it never demanded the money or refused to complete its performance. However, the language of the letter suggests otherwise:

> This letter is to inform you that we will need an increase of the money to finish this job. Normally we would honor our commitments, but this has been stretched out far to [sic] long.
>
> * * *
>
> To be fair, *we are asking for an increase of $3,225.00 to the contract to finish your system*, which is still less than we would charge for the same system today. [Emphasis added.]

Plaintiff's statement appears to be an unequivocal declaration of its intent not to complete its obligations under the contract unless defendants agreed to the price increase. The language of the letter is sufficiently positive to conclude that plaintiff would not perform its responsibilities under the contract, and the trial court did not err in concluding that this letter constituted an anticipatory breach of the contract.

C

Plaintiff also claims that it provided labor and materials under the contract for which it was not compensated by defendants, and that plaintiff is entitled to quantum meruit recovery for that work. One who first breaches a contract cannot maintain an action against the other contracting party for a subsequent breach or failure to perform, *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972), however, a plaintiff may be entitled to recover under a theory of quantum meruit for the value of services rendered, 5 Callaghan's Michigan Civil Jurisprudence, § 249, 344-345.

In this case, the court found that plaintiff was fully compensated by defendants for all work completed under the contract. This finding was supported by the fact that defendants made two payments to plaintiff and for both of these payments, plaintiff provided defendants with partial waivers. Defendants also testified that all of the items for which plaintiff sought compensation were either paid for or were never provided. The court's finding on this issue was supported by credible evidence, and the court did not err in concluding that plaintiff was not entitled to additional compensation.

D

Plaintiff next argues that the trial court erred when it found that the parties did not agree to a contract modification. Parties bound by an agreement, whether written or oral, may change the agreement by mutual consent. *Rasch v National Steel Corp*, 22 Mich App 257, 260; 177 NW2d 428 (1970). A written agreement may be the subject of subsequent oral modification only if it is supported by independent consideration. *Evans v F J Boutell Driveaway Co*, 48 Mich App 411, 418-419; 210 NW2d 489 (1973). The burden of proving the modification rests on the party alleging it. *Rasch*, *supra* at 260.

In this case, plaintiff requested an increase in the contract amount due to an alleged delay by defendants that prevented plaintiff from completing the project. Defendants admitted that they offered plaintiff an additional $1,000 to complete the project and the parties disputed whether plaintiff accepted the offer. The trial court found there was no agreement to a $1,000 increase in the price of the contract. This finding was supported by evidence presented at trial and is not clearly erroneous.

Even if the court had found that the parties had agreed to the $1,000 increase, this oral modification would be invalid. There was no evidence in the record suggesting that plaintiff offered any additional consideration for the modification of the contract. Plaintiff already had an obligation to complete the installations under the contract, and this pre-existing duty would not qualify as independent consideration sufficient for oral modification of the agreement. *Green v Millman Brothers*, 7 Mich App 450, 455; 151 NW2d 860 (1967). The parties could not orally modify their written agreement without independent consideration, and the court did not err in concluding that there was no agreement to modify the contract.

II

Plaintiff also argues that the trial court should not have awarded defendants mediation sanctions pursuant to MCR 2.403(O) because the court had no jurisdiction to rule on defendant's request for attorney fees and costs once the claim of appeal was filed. In response, defendants argue that this Court has no jurisdiction to review the lower court's decision to award mediation sanctions because plaintiff failed to file a separate claim of appeal regarding this issue.

MCR 7.203 governs this Court's jurisdiction over appeals from lower courts. Under the version of the rule in effect at the time plaintiff filed its claim of appeal, this Court had jurisdiction to hear an appeal of right from a final judgment or final order of the circuit court. MCR 7.203(A)(1). A final judgment or order in a civil case is defined as the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. MCR 7.202(8)(a)(1).[2]

In *Gherardini v Ford Motor Co*, 394 Mich 430, 431; 231 NW2d 643 (1975), our Supreme Court held that a postjudgment order awarding attorney fees and costs was a final judgment because it affected with finality the rights of the parties and was subject to this Court's jurisdiction as an appeal of right. This Court relied on the Supreme Court's holding in *Gherardini* in a recent decision allowing

[2] Now, MCR 7.202(7)(a)(1).

appeal of right from a circuit court order awarding attorney fees and costs. *Macomb County Taxpayers Ass'n v L'Anse Creuse Public Schools*, 213 Mich App 71, 76-77; 540 NW2d 684 (1995), rev'd in part on other grounds 455 Mich 1; 564 NW2d 457 (1997). Further, *Gherardini, supra* at 431, cites *People v Pickett*, 391 Mich 305; 215 NW2d 695 (1974), for the proposition that a case may have more than one "final" order or judgment. Because the order for mediation sanctions in this case affects the rights of the parties with finality, it is a final order which can be appealed as of right.

Although an order awarding mediation sanctions can be appealed of right, plaintiff's only claim of appeal in this case was filed prior to entry of the sanctions order. Typically, a claim of appeal does not cover an order entered after the claim has been filed. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1991); *Gracey v Grosse Pointe Farms Clerk*, 182 Mich App 193, 197; 452 NW2d 471 (1989). In *McDonald, supra* at 609, this Court held that it did not have jurisdiction to review an order granting mediation sanctions where the appellant failed to file a claim of appeal with regard to the order. See also *Fisher v Detroit Free Press, Inc*, 158 Mich App 409; 404 NW2d 765 (1987). Because plaintiff's claim of appeal was filed prior to entry of the order awarding mediation sanctions, and plaintiff filed no claim of appeal regarding the sanctions order, this Court has no jurisdiction to review this issue.[3]

Affirmed.

/s/ Roman S. Gribbs
/s/ Janet T. Neff
/s/ Peter D. O'Connell

[3] Because we are without jurisdiction to review the award of mediation sanctions, we do not address the issue of the trial court's jurisdiction to award the sanctions, raised by plaintiff on appeal.